BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

ELAINE M. YOUNG
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-181
Case No. 75-9002

S.S.A. No.

LAURA SCUDDER'S (PET, INC.)
(Employer)

Employer Account No.

Referee's Decision No. S-27377

The employer appealed from the decision of the referee which held the claimant was not disqualified for benefits under section 1256 of the Unemployment Insurance Code and the employer's reserve account was not relieved of charges under section 1030 of the code.

STATEMENT OF FACTS

The claimant was last employed as a plant worker by the above employer earning $4.22 per hour. She worked for approximately eight years until June 21, 1974 at which time she commenced a leave of absence until July 22, 1974 necessitated by a severe back ailment. The leave was then extended to August 1, 1974 and thereafter, in successive actions, to August 14, September 23, October 14, November 11 and finally to December 19, 1974.

In each instance the claimant complied with the employer's policy of obtaining supporting medical verification for the respective extensions by having her attending physician forward the necessary documentation directly to the employer's plant manager.

On December 16, 1974 the claimant again consulted with her doctor and was advised that her condition indicated surgery would be necessary. The following day the claimant called the office of the employer's plant manager and spoke to the secretary. She informed the secretary of what she had been told by her physician the previous day and of the necessity for requesting yet another extension of her leave of absence. She also asked that additional medical verification forms be sent to her.

On December 20, 1974 the claimant received the verification forms from the employer whereupon she forwarded them to her doctor the same day. The employer acknowledged the telephone conversation of December 17, 1974 with the claimant and the fact that it had, in connection with the previous requests for extension of the leave, received medical verification directly from the claimant's doctor on either the employer's forms or those prepared by the doctor.

Not having received substantiating documentation from either the claimant or her doctor, the employer wrote to the claimant on December 26, 1974 advising her of this fact and warning the claimant that she was in violation of the company's "Absence From Work Rules." The communication also indicated that further disregard of the "Absence From Work Rules" would result in the termination of the claimant's employment.

Pertinent provisions of the "Absence From Work Rules" referred to by the employer read as follows:

> "19. Absence: An absence from work for any reason must be reported to the company not less than one hour prior to starting of employee's shift. If your illness extends three (3) days or more you must have a letter, (M-6A or a written note from your doctor) indicating the approximate date of your return. Should your illness extend beyond date given, an extension must be sent to the Plant Manager before the date you were to have returned. A telephone call to the Plant Manager requesting an extension of a medical leave of absence, prior to expiration, will be exceptable /sic/ providing written verification from the doctor

is promptly submitted to the Plant Manager. This is your responsibility, not the doctors [sic] or the company. . . ."

Immediately upon receipt of the above mentioned warning letter, the claimant contacted her doctor's office to ascertain why the medical verification for the extension of her leave had not been forwarded to the employer. She was advised that the doctor's office was at that time overburdened with similar type requests and that the claimant's matter would be taken care of as soon as possible.

Following the above conversation, the claimant then attempted on several occasions to contact the plant manager personally but was unsuccessful. During one of these attempts to contact the plant manager she requested additional medical verification forms from the office personnel.

When the plant manager's office had not received the required medical substantiation by January 2, 1975, a decision was made to terminate the claimant's employment effective that date. The claimant was then advised by letter dated January 2, 1975 that her seniority rights had been cancelled pursuant to the collective bargaining in effect between the employer and the claimant's union and that her employment was terminated.

The claimant was not at any time aware that her doctor had not forwarded the medical forms to the employer until she received the above notice of termination.

The claimant ultimately underwent surgery and was not released to return to work until the latter part of July 1975.

REASONS FOR DECISION

Section 1256 of the Unemployment Insurance Code provides that an individual is disqualified for benefits, and sections 1030 and 1032 of the code provide that the employer's reserve account may be relieved of benefit charges, if the claimant has been discharged for misconduct connected with his most recent work.

In approving the definition of "misconduct" stated by the court in Boynton Cab Company v. Neubeck (1941), 237 Wis. 249, 296 N.W. 636, the court in Maywood Glass Company v. Stewart (1959), 170 Cal. App. 2d 719, 339 P. 2d 947, held that the term "misconduct," as it appears in section 1256 of the code is limited to conduct which shows wilful or wanton disregard of the employer's interest, such as deliberate violations or disregard of the standards of behavior which the employer has a right to expect of his employees, or carelessness or negligence of such a degree or recurrence as to show wrongful intent or evil design or intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his employer. On the other hand, the court continued, mere inefficiency, unsatisfactory conduct, poor performance because of inability or incapacity, isolated instances of ordinary negligence or inadvertence, or good faith errors in judgment or discretion are not "misconduct." The court also held that the employer has the burden of establishing "misconduct" to protect its reserve account.

In Appeals Board Decision No. P-B-103, the then constituted Board was faced with an almost identical set of facts. The claimant had obtained a medical leave of absence because of a disabling back injury. A few days prior to the expiration of her leave, it was determined that she would be unable to return to work as originally planned. She requested her doctor to forward further substantiation to the employer of the necessity to extend her leave of absence, which the doctor assured her would be done. The doctor then neglected to immediately furnish the employer with the necessary verification and, when the claimant failed to report for work within three days following the end of her leave of absence, the employer terminated the claimant's employment pursuant to the terms of the collective bargaining agreement between the employer and the claimant's union.

In a three-to-two decision the majority of that Board held that the claimant had been discharged for misconduct on two bases, viz, (1) violation of the collective bargaining agreement regarding proper notification and verification concerning the extension of the leave of absence and (2) carelessness or negligence of such a degree as to show an intentional and substantial disregard of the employer's interests or of the claimant's duties and obligations to her employer. It was reasoned that the obligation of the claimant to advise her employer of her anticipated absence was a material

duty owed to the employer in furtherance of the employer's requirements of being able to maintain a stable work force with any reasonable degree of predictability and that that duty had been substantially breached by the claimant's reliance upon her doctor to furnish the necessary medical certification.

While we have maintained, as the Board did in Appeals Board Decision No. P-B-103, that the violation of a provision in a collective bargaining agreement does not in and of itself constitute "misconduct," the impact of that decision has fostered the opposite result. We think that the turning point upon which such matters should be resolved is whether in any given case a claimant has substantially complied with the employer's requirements in a manner reasonably designed to impart to the employer the notification of an impending absence or of the need for an extension of an existing leave of absence. To conclude that the claimant's act of relying upon his physician to furnish required medical verification is by itself culpable negligence and thus a substantial breach of a material duty owed to the employer as well as a breach which is wilful or wanton is, without more, pure fantasy.

In the case under review, it is our opinion that the claimant substantially complied with the employer's requirements that she notify the employer of the necessity of extending her leave of absence and that she took those steps reasonably calculated to provide the employer with verifying medical documentation. In fact, the employer admittedly had actual knowledge that the claimant would be unable to return to work at the expiration of her leave and that she was attempting to secure supporting medical evidence. Under these circumstances we cannot find that the claimant wilfully disregarded the employer's interests or her obligations towards it. Accordingly, we hold the claimant is not disqualified for benefits within the meaning of section 1256 of the code.

Insofar as Appeals Board Decision No. P-B-103 is inconsistent with the opinions expressed herein, Appeals Board Decision No. P-B-103 is overruled.

DECISION

The decision of the referee is affirmed. Benefits are payable as provided in the referee's decision. The employer's reserve account remains subject to benefit charges.

Sacramento, California, January 29, 1976.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

MARILYN H. GRACE

CARL A. BRITSCHGI

RICHARD H. MARRIOTT

DISSENTING - Written Opinion Attached

HARRY K. GRAFE

## DISSENTING OPINION

I dissent.

For all practical purposes, my colleagues this day have overruled Appeals Board Decision No. P-B-103; however in its place they have deposited a vague rule of "substantial" compliance which can hardly find affinity with the facts of this case. I perceive our role as one of fashioning workable solutions having rational relations to problems with which we are confronted. Thus, it is one thing to strike down a precedent (as my colleagues have done to P-B-103), but in taking such action, we are duty-bound to formulate a replacement rule which affords practical guidance equally to employees and employers, and which facilitates a uniformity of application by the Department and the Administrative Law Judges. It is in this area of formulation that I fear the majority have failed.

The problem pattern demonstrated by these cases relates to the furnishing and receipt of medical substantiation to support the request for extension or continuation of a sick leave. Often the requirement for such verification is expressed as a provision of the collective bargaining agreement which binds the employees and their employer. However, the requirement has equal force if it is merely a rule established by the employer which governs the conditions of employment of his employees.

If there is one thread of truism interwoven among the factual variations of these cases it is that the responsibility for presenting the medical verification to the employer begins, remains, and ends with the employee. The employee cannot abdicate his responsibility by shifting it to his physician. When the employee is accepted as a patient, the physician does not thereby assume the employee's responsibility to comply with the provisions of the collective bargaining agreement or the employer's rule. Even the most casual reader of Medical Economics must appreciate that most medical care is funded by third party payors (health insurance or government programs) which necessitates an enormous volume of paperwork on the part of the physician. When there is added to this mountainous maze of insurance company and government

program forms the request for written documentation to justify an extension of sick leave, one can readily understand why the physician may be late in preparing and dispatching a medical leave verification form. I am not posing as an apologist for the medical profession, rather I outline these facts of life to place in proper perspective the separate roles of the employee and his physician, and to show that both as a matter of practicality and as a matter of law the obligation to the employer, whether arising by contract or by rule, is solely that of the employee.

The majority opinion in this case states that "substantial" compliance by an employee with the employer's requirements will remove the matter from the realm of "misconduct" as that term is used in section 1256 of the code and as it has been judicially defined in Maywood Glass Co. v. Stewart, (1959) 170 Cal. App. 2d 719. Under section 1256, the burden of establishing misconduct is placed on the employer. Moreover, it seems essential that the employee know what he can and cannot do without committing misconduct (Perea v. Fales (1974) 39 Cal. App. 3d 939). Thus it is necessary both from the standpoint of the employer and the employee that any precedential rule of conduct or lack of conduct be developed and stated with sufficient clarity to guide each party in his relations with the other.

I feel my colleagues have not achieved that essential test in this case. Black's Law Dictionary (Fourth Edition) defines the terms "substantial performance" and "substantially" as follows:

> "Substantial Performance. Exists where there has been no willful departure from the terms of the contract, and no omission in essential points, and the contract has been honestly and faithfully performed in its material and substantial particulars, and the only variance from the strict and literal performances consists of technical or unimportant omissions or defects. Cotherman v. Oriental Oil Co., Tex. Civ. App., 272 S.W. 616, 619; Brown v. Aguilar, 202 Cal. 143, 259 P. 735, 737; Cramer v. Esswein, 220 App. Div. 10, 220 N.Y.S. 634; Connell v. Higgins, 170 Cal. 541, 150 P. 769, 774. Performance except as to unsubstantial omissions with compensation therefor. Cassino v. Yacevich, 261 App. Div. 685, 27 N.Y.S. 2d 95, 97, 99.

> "Substantially. Essentially; without material qualification; in the main; in substance; materially; in a substantial manner. Kirkpatrick v. Journal Pub. Co., 210 Ala. 10, 97 So. 58, 59; Gibson v. Glos, 271 Ill. 368, 111 N.E. 123, 124; McEwen v. New York Life Ins. Co., 23 Cal. App. 694, 139 P. 242, 243. About, actually, competently, and essentially. Gilmore v. Red Top Cab Co. of Washington, 171 Wash. 346, 17 P. 2d 886, 887."

It can thus be seen that "substantially" comes very near to being full and actual compliance. An employee may be said to have "substantially" complied with the employer's requirements if he has essentially fulfilled all material terms and has only omitted some technical or insignificant detail. Although I have no quarrel with the imposition of such a "substantial compliance" mandate upon persons who would extend leaves of absence, and although the majority opinion herein articulates such a requisite, the majority go further and hold that the claimant in the instant case "substantially complied" with the employer's requirements. The facts of this case, I submit, fall far short of the definitions set forth above. Therefore, one can only wonder as to the real meaning of the term "substantially" as used by my colleagues.

Under the facts of the instant case, the claimant began her sick leave June 22, 1974. In accordance with the employer's rules, the claimant obtained medical verification for six consecutive extensions of her leave (to August 1, to August 14, to September 23, to October 14, to November 11, and finally to December 19, 1974). On December 16, the claimant visited her physician and learned she would not be able to return to work December 19. On December 17 the claimant called the employer's plant and asked for forms to extend the leave. The claimant received the forms in the mail on December 20 and on that day forwarded them to her physician in Modesto.

The employer had not received any request for extension of the leave or medical verification by December 26, so on that date dispatched a letter to the claimant and to her union warning her that she was in violation of the employer's "Absence From Work" rules and indicating that

discharge would follow unless she complied with such rule. The claimant received this warning letter on December 28. She then called her physician's office and "they said, well, Elaine, we have thousands of papers here" and they didn't know whether they had the claimant's or not. The claimant then called her union and thereafter called the employer's plant to obtain additional forms to transmit to her physician. On January 2, 1975 the employer, having received no response to the December 26 letter, sent the claimant notice of termination, effective that date. This notice was received by the claimant on January 6, 1975.

The employer's rule requires written medical verification for extension of sick leave be received in advance of the date an employee is scheduled to return to work. However, an employee is allowed to phone the plant manager requesting an extension prior to expiration of an earlier leave, so long as written medical verification is promptly submitted. The rule expressly provides: "This is your responsibility" not that of the physician or the employer.

During the course of the hearing before the Administrative Law Judge, the claimant admitted she had not contacted the plant manager, Dave Lawton.

> "MR. GOUGH: Yes. Q Is there any reason, then, you wouldn't have contacted Dave Lawton, when you received the warning letter of December 28?
>
> "MRS. YOUNG: Yes, I tried to when I would call. He was always out in the yard. They called him and they said, Elaine, Dave is out in the yard.
>
> "Q Did you follow up and leave messages, then, for him to call you back? A Yes, I did, twice.
>
> "Q And your testimony, then, is he did not call you back? A No, he didn't.
>
> "Q Did you then call him to find out why he didn't call you back? A No, no." (Referee's transcript, page 23, lines 5 through 16)

Here, the claimant was familiar with the employer's rule, having obtained the sick leave and six extensions. She must have realized that quick action was necessary when she learned on December 16 that she could not return to work December 19. At that time the claimant could have come within actual compliance of the employer's rule by obtaining the proper forms and having her physician prepare them and by the claimant submitting them to the employer prior to December 19. Or the claimant could have followed the alternative means of actual compliance by phoning the plant manager, requesting an extension and obtaining written medical verification promptly thereafter. The claimant followed neither course of action.

Although the claimant knew her extended leave expired December 18, she did not receive the forms from the employer until December 20, at which time she forwarded them to her physician. At that time, I submit, the claimant could have "substantially" complied with the employer's rule by phoning the plant manager, requesting an extension and explaining she was sending the verification forms to her physician. It appears to be the employer's view that claimant would have been considered to have "substantially" complied if she had conversed telephonically with the plant manager as late as December 28, the date she received the warning letter. Although the claimant "asked for" the plant manager when she phoned to request another set of forms, upon being told he was busy, she relied on him to call her instead of making further effort to reach him. To summarize, I believe the claimant's lack of any genuine effort to reach the plant manager by phone from December 20 forward negates any "substantial" compliance, especially in view of the fact she was in possession of the employer's warning on December 28 that she must take appropriate action at once. That warning was signed by the plant manager.

It is one thing to enunciate that the rule to be applied will be that of a claimant having "substantially" complied with the employer's requirements. But it is something else to assert, as does the majority opinion, that facts which are actually the antithesis of "substantial" compliance meet and fulfill the test of the rule. As a matter of actuality, there was no contact of the plant manager by the claimant until after January 13, 1975 when she obtained a letter from her physician. In light of the express provisions of the

employer's rule, the claimant's knowledge thereof, and her realization that her extended leave did not continue beyond December 18, 1974, it simply cannot be held that this claimant "substantially" complied with the employer's requirements, in view of the legal definitions of that term cited above.

Thus, I must register my dissent, with the commentary that the true application of a rule of an employee having "substantially" complied, in accord with the legal principles set out in the definitions, supra, would be preferable to Appeals Board Decision No. P-B-103.

HARRY K. GRAFE